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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~965~~ 109

HENRY DU BOIS' SONS CO., INC.,

Petitioner,

against

HAZEL DUNBAR, as Administratrix under limited letters of the Estate of ROBERT DUNBAR, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on February 10th, 1960, as affirms the judgment against petitioner entered in the United States District Court for the Southern District of New York in the sum of $62,000 in favor of respondent herein.

Opinion of the Court Below

The opinion of the United States Court of Appeals f the Second Circuit (Circuit Judges Sterry R. Waterma Charles E. Clark and Carroll C. Hincks) is reported 275 F. (2d) 304 and is set out in the Appendix to th Petition (pp. 15-22). The judgment of the United Stat Court of Appeals also is set forth in the Appendix to th Petition (p. 23). Rehearing *en banc* was denied with opinion and the court's memorandum dated March 9, 19 is printed in the appendix to this petition (p. 25).

Jurisdiction

The judgment of the United States Court of Appea for the Second Circuit was entered on February 10t 1960. The Petition for rehearing *en banc* was denie March 9th, 1960.

The jurisdiction of this Court is invoked under Ti 28, U. S. Code, Section 1254 (1).

Questions Presented

1. Whether the failure of a seaman to do the work wh he was hired to do (pump his vessel), bars his person representative from recovering damages from his em ployer for his death under the Jones Act where the jur has found specifically and expressly that decedent's breac of duty was one of the causes of the sinking of his vesse and of his loss of life?

2. Whether a seaman's neglect of duty which the jur found contributed to the sinking of his vessel and his los of life, which was a violation of the Penal Statutes of th United States, 18 U. S. Code 2196, bars recovery unde the Jones Act for the seaman's loss of life?

3. Whether the doctrine of indemnity resulting from failure properly to perform work agreed to be done by contract, applies equally to a seaman who fails to do the very work which he was hired to do (pump his boat) and from which he perishes and whether that rule requries him or his representative to indemnify his employer for the ensuing damages suffered by the employer?

4. Whether the trial court should not have granted the motion for judgment *Non obstante veredicto* after the jury expressly found that decedent's demise in part was due to his own neglect of duty as a seaman?

Statutes Involved

The Statutes involved are the Jones Act, Title 46, U. S. Code, Section 688, incorporating 45 U. S. Code, Section 53, 54 (printed herein at p. 26) and 18 U. S. Code, Section 2196 (printed herein at p. 10).

Statement of Facts

The plaintiff, as Administratrix of the Estate of Robert Dunbar, deceased, filed suit under the Jones Act, Title 46 U. S. Code, Section 688, in the United States District Court for the Southern District of New York to recover damages for the alleged wrongful death of the decedent, who was Captain or Barge Master of the floating derrick TRENTON. That vessel capsized and sank at the entrance to Hempstead Harbor, Long Island Sound, New York, while being towed on a hawser by the tug CORTLAND on June 7th, 1955, at about 1:40 A. M. Decedent's body was found in the sleeping quarters of the TRENTON. He was the only one on board that vessel, which had no power of its own.

In a civil jury suit the jury returned a $62,000 verdict against petitioner, the owner of the derrick TRENTON and

decedent's employer. The jury returned its verdict answering in writing, 9 typewritten questions include among which were the following:

> "Question No. 5—Was the deceased negligent the performance of his duties aboard the TRENTON Answer—Yes.
>
> Question No. 6—Did such negligence of Robert Dunbar contribute in whole or in part to occasioning sinking of the TRENTON and his drowning? Answer Yes.
>
> Question No. 7—State in what percentage you fi that such negligence of Robert Dunbar did contrib to occasioning his drowning? Answer—20%."

The jury also answered other questions and stated th the derrick TRENTON was in an unseaworthy condition because of the negligence of petitioner, that this condition caused or contributed to the sinking of the TRENTON an the drowning of the deceased and that the negligence of the petitioner in the maintenance and operation of th derrick caused and contributed to the sinking of the TRENTON and the drowning of the deceased.

Petitioner and respondent both are citizens of New York Respondent, plaintiff below who selected the Federa Courts as his forum elected to rest his claim for relief entirely on the Jones Act and not claim liability without fault for unseaworthiness over which the Federal Courts lacked jurisdiction, *Jasonis* v. *Oliver J. Olson & Co.*, 2 F. (2d) 307; *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 221 F. (2d) 615.

There was no eyewitness testimony as to what caused the accident. The Captain of the tug CORTLAND, which was towing the TRENTON astern on a 35 fathom hawser, testified that fifteen minutes before the capsizing he looked back and saw that the TRENTON was riding satisfactorily. At about 1:40 A. M. the Captain of the tug first realized

something was wrong, but only because he felt a drag in steering. Looking back he saw that the TRENTON was capsizing and it was too late for him to do anything to save the TRENTON or the deceased. The dump scow SEA GATE was being towed close up astern of the TRENTON. Her Captain was asleep at the time of the occurrence but neither the SEA GATE or her Captain suffered any injury.

The TRENTON had been taken in tow at 9:00 P. M., June 6th at Roosevelt Street, Manhattan on the East River. The tow had proceeded for 4½ hours through Hell Gate and Long Island Sound. The capsizing occurred at a point where the tow had to change its heading from a minimum of 22 degrees to a maximum of 45 degrees to her right, according to conflicting testimony .

The TRENTON was heavily constructed having originally been a carfloat and she had a high A-frame on her deck. Admittedly no hole or break in her side, bottom or end planks ever was found on the TRENTON. The respondent Administratrix rested her claim on the contention that the TRENTON was not properly caulked and that she therefore leaked excessively.

The only testimony as to the condition of the TRENTON'S seams under water came from those who had inspected the TRENTON after she capsized and lay sunk for three days and after she had been raised and towed some 28 miles full of water, in slings of the Merritt-Chapman & Scott derrick MONARCH. When she thus arrived at a shipyard in Staten Island she had a twist of 18 inches, one corner was up and another corner was down and this and other experiences admittedly would force oakum out of her seams.

It was conceded that all wooden boats leak and it was established without contradiction, that the TRENTON was equipped with four pumps, two steam siphons, a duplex steam pump and a portable gasoline pump. These were

capable of pumping 77 tons or 21,000 gallons per hour of water from her bilges. The TRENTON had been towed to many parts of Long Island Sound and up the Hudson River on many occasions prior to this occurrence, without difficulty.

The case was tried before Chief Judge Sylvester Ryan and a jury in January 1959 and on the basis of the 9 answers of the jury to the typewritten questions submitted to it, judgment was entered for $62,000. A motion for judgment *Non obstante veredicto* was denied by the District Court, without opinion.

The District Court at the end of the trial had dismissed Petitioner's Third-Party Complaint against BRONX TOWING LINE INC., the operator of the tug CORTLAND in which indemnity was sought. The judgment entered in the District Court recited the dismissal of the Third-Party Complaint. Upon appeal to the United States Court of Appeals for the Second Circuit, so much of the judgment in the District Court as dismissed the Third-Party Complaint, was reversed and a new trial of the third party complaint was ordered and that part of the judgment of the Court of Appeals is not made the subject of the instant Petition.

The opinion of the United States Court of Appeals rendered by Circuit Judge Sterry R. Waterman, holds that decedent's breach of his contract of employment with his employer does not operate as an absolute bar to recovery by his Administratrix for his death under the Jones Act. Although the three-member Court was unanimous in its conclusion, its members reached their individual conclusions by divergent routes. The Court expressly deviates from a prior decision of a different panel of the same Court in 1952, in *Walker* v. *Lykes Bros. S. S. Co., Inc.*, 193 F. (2d) 772 and it expresses disagreement with the Fourth Circuit and the Sixth Circuit. On February 19th, 1960, the Petitioner filed a Petition for rehearing *en banc* and this was denied March 9th, 1960.

Reasons for Granting of Writ

1. The question underlying the decision of the Court of Appeals, which held that suit for wrongful death under the Jones Act is not barred when a seaman's death is brought about in part at least by his failure to do the work for which he was hired, is a constantly recurring question in Courts all over this country. This is evidenced to some extent by the following cases:

Mason v. *Lynch Brothers, Company*, (C. A. 4) 1956, 228 F. (2d) 709;
Spero v. *S/S The Argodon*, (E. D. Va.) 1957, 150 F. Supp. 1;
Dixon v. *U. S.*, (C. A. 2) 1955, 219 F. (2d) 10;
Walker v. *Lykes Bros.*, (C. A. 2) 1952, 193 F. (2d) 772;
Boat Dagny Inc. v. *Todd*, (C. A. 1) 1955, 224 F. (2d) 208;
Chesepeake & Ohio Ry. v. *Newman*, (C. A. 6) 1957, 243 F. (2d) 804.

Unquestionably in the large number of Jones Act cases presently pending in the several District Courts, the same question will be presented in many. The decisions of the several Courts of Appeals are entirely dissimilar and are in sharp conflict with each other (footnote 1, Court of Appeals opinion herein, Appendix p. 19). In addition the members of the panel in the Second Circuit Court of Appeals who decided the instant case, expressed a three-way disagreement among themselves, besides a disagreemnt with those panels of that Court which decided *Walker* v. *Lykes Bros.*, 193 F. (2d) 772 and *Dixon* v. *United States*, 219 F. (2d) 10.

The statement:

> "Judge Clark believes that in a proper case a panel of this court may frankly state its disagreement with another panel and refuse to be bound thereby."

is in direct conflict with what the same Court said in *American-Foreign Steamship Corp.* v. *United States*, 25[illegible] F. (2d) 136, at page 142:

> "If the subject matter of these appeals were *Re[illegible]nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. However, we will not overrule these recent decisions of other panels of the Court."

In *Insurance Agent's International Union* v. *National Labor Relations Board*, 260 F. (2d) 736, the District of Columbia Court of Appeals stated it was bound by its own precedent. Thus both the procedure followed and the rule of substantive law announced by the decision of the Court of Appeals for the Second Circuit herein are in conflict with its own decisions and decisions of other Circuits.

The decision of the Court of Appeals for the Second Circuit herein is in conflict with the decisions of the Supreme Court in cases involving the Federal Employers Liability Statute, and it is in conflict with the long-established and basic rule that an employee must indemnify his master for damages visited on his master in consequence of the employee's neglect of duty, *Washington Gas Light Company* v. *District of Columbia*, 161 U. S. 316, at page 328. The Supreme Court repeatedly has denied recovery for injuries or death under the Federal Employers' Liability Act where the injury or death was brought about by the empolyee's failure to perform his duty to his employer.

As this Court said in *Davis* v. *Kennedy*, 266 U. S. 147, at 148:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to re-

cover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more. Frese v. Chicago, B. & Q. R. Co., 263 U. S. 1, 3, 68 L. ed. 131, 132, 44 Sup. Ct. Rep. 1.'"

Please see also:

Southern Railway Company, et al. v. *Mary Elizabeth Youngblood*, 286 U. S. 313; 76 L. ed. 1127;
Unadilla Valley Railway Company, v. *Ernest Caldine*, 278 U. S. 139;
Great Northern R. Co., v. *Wiles*, 240 U. S. 444.

As Mr. Justice Harlan stated in 1955 when writing for the Second Circuit Court of Appeals in *Dixon* v. *United States*, 219 F. (2d) 10, at page 16:

"Cases such as Walker v. Lykes Bros. S. S. Co., 2 Cir., 1952, 193 F. 2d 772; Great Northern Railway Company v. Wiles, 1916, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732, and other cases of the same tenor which the appellant cites, are in no way inconsistent with the rule that assumption of risk is not a defense or comparable to the situation before us. Those cases are only instances of the firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship. Their result turns really not upon any question of 'proximate cause,' 'assumption of risk' or 'contributory negligence,' but rather upon the employer's independent right to recover against the employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work."

2. The reasoning of the Judges of the Court of Appeals fails to give effect to the public policy declared by Congress in 1948 by the enactment of Section 2196 of Title 18, U. S. Code, 62 Stat. 801.

Title 18, U. S. Code 2196 provides:

> "Sec. 2196. Drunkenness or neglect of duty by seamen
>
> Whoever, being a master, officer, radio operator, seaman, apprentice or other person employed on any merchant vessel, by willful breach of duty, or by reason of drunkenness, does any act tending to the immediate loss or destruction of, or serious damage to, such vessel, or tending immediately to endanger the life or limb of any person belonging to or on board of such vessel; or, by willful breach of duty or *by neglect of duty* or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such vessel from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life and limb, shall be imprisoned not more than one year. June 25, 1948, c. 645, 62 Stat. 801." (Italics ours)

Thus Congress ordained in 1948 that a seaman's "neglect of duty" which results in the sinking of his vessel shall be dealt with severely.

The decision of the Court of Appeals, Second Circuit, is in conflict with Title 18, U. S. Code 2196 for the opinion says:

> "Judge Hincks concludes that *Walker* does not go so far as to hold that failure to remain alert under the circumstances here involved would constitute a breach of a 'primary duty' in violation of a term of employment consciously assumed."

and again:

> "Judge Clark and I believe that the *Walker* doctrine is incompatible with the congressional mandate that contributory negligence and assumption of risk shall not bar a recovery in a Jones Act case."

Title 18, U. S. Code 2196 stamps as a primary duty, a seaman's duty to pump his vessel and save her from sinking. The holding of the Court of Appeals, Second Circuit, that the neglect of duty of decedent herein which "contributed in whole or in part to occasioning the sinking of the TRENTON and his drowning" was not the violation of a primary duty therefore, is in conflict not only with the traditions of the sea established long before enactment of the Jones Act, but it is in direct contravention of the public policy clearly established and explicitly set forth in Title 18, U. S. Code 2196.

One guilty of criminal neglect of duty should not profit financially from that act. Likewise, his next of kin should be barred from such ill gotten gains. Since the jury found that decedent's neglect of duty was a cause of the sinking of the derrick TRENTON and decedent's death, his default constituted more than contributory negligence.

It is anomalous to say that neglect of duty which a jury finds was a cause of the sinking of a vessel, is a criminal offense under one Statute, but that it only is contributory negligence under the Jones Act.

In view of the clear language and unmistakable meaning of Title 18, U. S. Code 2196, there can be no room for doubt as to the legal consequences of decedent's delict as found by the jury.

The cases are legion which hold that the Captain or Deckhand in charge of a Harbor barge, scow or lighter without propelling power of her own, has a duty to pump the vessel, *The J. G. Rose*, C.C.A. 2, 9 F. (2d) 917; *Eclipse*

Lighterage v. *Cornell Steamboat Co.*, 242 Fed. 927; *The Raymond M. White*, 290 Fed. 454; *The Daniel Burns*, 52 Fed. 159, Affirmed 56 Fed. 605, C.C.A. 2. The Captain is also under a duty to examine her for damage and call for assistance if needed, *United States* v. *Carroll Towing*, 159 F. (2d) 169, C.C.A. 2; *The Irving*, 16 F. Supp. 22, at page 27, Affirmed 91 F. (2d) 1011, C.C.A. 2, to act as general watchman and caretaker, *Monk* v. *Cornell Steamboat Co.*, 198 Fed. 472, C.C.A. 2; *Daly* v. *Carroll*, 248 Fed. 466, C.C.A. 2.

Decedent's duty to his employer, expressly undertaken, was a continuing one for the duration of the voyage. With the facilities for pumping at hand and the capacity of the TRENTON's pumps, decedent had it in his power to render inoperative such deficiencies of the TRENTON's caulking as may have existed and of which he is charged with knowledge.

3. The decision of the Court of Appeals for the Second Circuit herein and the statement:

> "Judge Clark and I believe that the Walker doctrine is incompatible with the congressional mandate that contributory negligence and assumption of risk shall not bar a recovery in a Jones Act case"

are inconsistent and in conflict with the basic rule of law as enunciated by this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, 350 U. S. 124; *Weyerhaeuser* v. *Nacerima Operating Co.*, 355 U. S. 563 and *Crumady* v. *The J. H. Fisser*, 358 U. S. 423. In them it was firmly established that one who breaches a contract is liable for the consequences of that breach and must indemnify the other party to the contract in the event legal liability is visited on that other party as a result thereof. An employee must indemnify his employer for the damages visited on the employer by the employee's neglect, *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 328.

A claim for indemnity is not in tort, but is in contract, *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, 350 U. S. 124 at page 131. The claim for indemnity is not changed from one in contract to one in tort simply because recovery may turn upon the standard of the performance of the service, *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, 350 U. S. 124 at page 133.

If a claim for indemnity is not in tort and cannot be converted to a tort claim, then a defense based on a claim for indemnity cannot be converted into a tort concept of contributory negligence.

Mr. Justice Harlan's comments in *Dixon* v. *United States* 219 F. (2d) 10, 16 (1955 C. A. 2), gain added strength from *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Co.*, 350 U. S. 124; *Weyerhaeuser* v. *Nacirema Operating Co.*, 355 U. S. 563 and *Crumady* v. *J. H. Fisser*, 358 U. S. 423.

It is to be noted that under Question 5, submitted to the jury herein, the jury expressly found decedent guilty of neglect "in the performance of his duties aboard the TRENTON." The jury was not asked to find whether the decedent was guilty of negligence generally. The jury found the decedent at fault only because he had failed to perform the contractual duty which he owed to his employer—a breach of contract for which the decedent must indemnify his employer. As Mr. Justice Harlan and Judge Learned Hand earlier had indicated, the decedent's breach of duty to his employer has nothing to do with contributory negligence in the Jones Act sense, *Dixon* v. *United States*, 219 F. (2d) 10, 16; *Walker* v. *Lykes Bros. S. S. Co.*, 193 F. (2d) 772.

4. Whatever issue of fact existed as to Dunbar's failure to perform his consciously contracted duties was resolved in favor of petitioner by the jury's finding on Questions Nos. 5 and 6. After the jury found that deceased had failed to perform his duties aboard the TRENTON

and that this was a cause of the TRENTON's sinking and decedent's loss of life, when petitioner moved in the District Court on formal papers for judgment *non obstante verdicto*, a naked question of law was presented and on appeal the judgment should have been reversed and petitioner should have had judgment dismissing the complaint, *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: New York, N. Y., May 26, 1960.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

275 F(2)304

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 37—October Term, 1959.

(Argued November 5, 1959 Decided February 10, 1960.)

Docket No. 25589

HAZEL DUNBAR, as Administratrix under Limited Letters of the Estate of ROBERT DUNBAR, Deceased,

Plaintiff-Appellee,

—v.—

HENRY DUBOIS' SONS CO., INC.,

Defendant and Third-Party Plaintiff-Appellant,

—v.—

BRONX TOWING LINE, INC.,

Third-Party Defendant-Appellee.

Before:

CLARK, HINCKS and WATERMAN,

Circuit Judges.

Appeal from orders of the United States District Court for the Southern District of New York, Ryan, *J.*, denying employer's motion for judgment n.o.v. in an action under

the Jones Act, 46 U. S. C. 688, by administratrix of the estate of deceased employee, and dismissing employer's third-party action for indemnity brought against owner of tug towing vessel upon which deceased was employed. Order denying motion for judgment n.o.v. affirmed. Order dismissing third-party action reversed, and cause remanded.

TASHOF & SOBLER and PAUL C. MATTHEWS (Paul C. Matthews, John J. Robinson, Edwin M. Bourke, of counsel) New York City, *for Plaintiff-Appellee.*

PURDY, LAMB & CATOGGIO (Vincent A. Catoggio, of counsel), New York City, *for Defendant and Third Party Plaintiff-Appellant.*

FOLEY & MARTIN (John F. Quarto, of counsel), New York City, *for Third-Party Defendant-Appellee.*

WATERMAN, *Circuit Judge*:

Plaintiff's intestate, Robert Dunbar, was a deckhand employed aboard the *Trenton*, a steam derrick incapable of self-propulsion used in dredging operations. On June 6, 1955, the *Trenton* completed an assignment in the East River. The *Trenton* was to be used the following morning in Hempstead Harbor on the north coast of Long Island. Dunbar was the only employee aboard the *Trenton* as it was towed that evening to Hempstead Harbor by the tug *Cortland*. Early the next morning as the tug was turning to enter that harbor the *Trenton* capsized and Dunbar was drowned.

Dunbar's wife, as administratrix of his estate, brought actions for wrongful death against DuBois, owner of the

Trenton and appellant herein, and Bronx Towing, owner of the *Cortland*. The action against appellant was based upon the Jones Act, 46 U. S. C. 688. Appellant filed a third-party action for indemnity against Bronx Towing alleging that the accident resulted from the negligent operation of the *Cortland*. After presentation of the evidence, both appellant's third-party action and plaintiff's original action against Bronx Towing were dismissed. The dismissal of plaintiff's action against Bronx Towing is not contested on this appeal. The jury, although finding that Dunbar was 20 per cent negligent, returned a verdict on written interrogatories for $62,000. Appellant appeals from plaintiff's judgment against it in the wrongful death action and from the dismissal of its third-party action against Bronx Towing.

I

The Action for Wrongful Death Under the Jones Act.

Plaintiff maintained that appellant was negligent in failing properly to caulk the *Trenton's* hull with the result that the *Trenton* capsized because of increased leakage when in tow. This contention was supported by substantial evidence adduced at trial. Appellant objects to various rulings of the trial court, but these objections are without merit. More serious is appellant's contention that, under the doctrine of *Walker* v. *Lykes Bros. S.S. Co.*, 193 F. 2d 772 (2 Cir. 1952), inasmuch as the jury found Dunbar to have been negligent, that finding operates as a complete bar to any recovery for his death.

Walker was an action under the Jones Act brought by the master of a vessel who had been injured when struck by a drawer of a steel filing cabinet, the drawers of which were defectively secured. There was evidence that the defective condition of the cabinet was known to the master

from the very beginning of the voyage, and that this condition could have been corrected, if not at sea, then certainly at ports of call visited in the interval between the beginning of the voyage and the occurrence of the accident. This court, Judge Swan, L. Hand and A. N. Hand, reversed judgment for the master and remanded for a new trial. The court indicated that if the jury should find that the master had negligently performed his supervisory duties, such a finding would operate as a complete bar to recovery. The court, by L. Hand, said:

> "We shall therefore accept the conventional rubric and think of contributory negligence as the breach of a duty to the wrongdoer. The important thing in situations like that at bar is to distinguish between such a duty, which the law imposes upon the injured person, regardless of any conscious assumption of a duty towards the wrongdoer, and a duty which the injured person has consciously assumed as a term of his employment. By 'contributory negligence' which results in no more than reducing the amount of an employee's recovery, the Act means the first; the second is a bar to any recovery." *Supra*, at 773.

Appellant argues that the *Walker* case should govern here to preclude plaintiff's recovery. Appellant points out that one of Dunbar's principal duties aboard the *Trenton* when in tow was to man the pumps should leakage occur. The argument continues that the jury, in returning a verdict for plaintiff, must have accepted appellant's contention that the *Trenton* capsized because of leakage resulting from improper caulking; and that the jury's finding that Dunbar was 20 per cent negligent can only be based upon his failure to put the pumps to work. Thus appellant concludes that Dunbar's breach of his contractual duty to man the pumps was a significant cause of the accident. Moreover,

appellant suggests that Dunbar, the sole employee aboard the *Trenton*, might be regarded as its Chief Officer should such status be deemed essential in order to invoke the *Walker* doctrine.

We of this panel are in complete agreement that the statements made in the *Walker* opinion do not operate to bar recovery in the present case. Our reasons supporting this unanimity of result differ.

Judge Hincks believes that the present case is distinguishable from *Walker* upon its facts. At the time of the accident decedent had been on continuous duty for seventeen hours, and Judge Hincks points out that the jury might well have found that, though decedent was to some extaint at fault in falling asleep and thus failing to man the pumps, the principal fault was the underlying failure by appellant to furnish an adequate crew. Judge Hincks concludes that *Walker* does not go so far as to hold that failure to remain alert under the circumstances here involved would constitute a breach of a "primary duty" in violation of a term of employment consciously assumed.

Judge Clark and I believe that the *Walker* doctrine is incompatible with the congressional mandate that contributory negligence and assumption of risk shall not bar a recovery in a Jones Act case.[1] See *Boat Dagny* v. *Todd*,

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[1] Efforts made by other circuits to distinguish the *Walker* case have not been particularly successful. The Fourth Circuit has construed *Walker* as applying only to masters of oceangoing vessels on long voyages. See *Mason* v. *Lynch Brothers Co.*, 228 F. 2d 709, 712 (4 Cir. 1956); *Spero* v. *Steamship The Argodon*, 150 F. Supp. 1 (E. D. Va. 1957). However, as we have pointed out in *Dixon* v. *United States*, 219 F. 2d 10, 16 (2 Cir. 1955), the rationale of the *Walker* doctrine applies generally to a breach of contractual duty by an employee and does not depend upon the rank of the employee or the class of the vessel or the length of the voyage. We regard the Fourth Circuit's interpretation as a courteous method of escaping the consequences of the *Walker* doctrine without overtly repudiating an

(*Footnote continued on following page*)

224 F. 2d 208, 211 (1 Cir. 1955). Judge Clark believes that in a proper case a panel of this court may frankly state its disagreement with a decision of another panel and refuse to be bound thereby. It is my position that the court in the *Walker* case expressly recognized and stated that the principles that courts have subsequently regarded as the "Walker doctrine" were not required to be enunciated in order to decide the issues then present before the court; and therefore whatever binding effect the holdings of one panel of a court may have upon a subsequent panel of the same court need not here concern us. Thus, although we reach our decision by different routes, the three members of this panel agree that the *Walker* doctrine does not require that we reverse the judgment below against appellant DuBois.

We affirm the judgment in the wrongful death action.

II

Dismissal of the Third-Party Action.

The district court dismissed appellant's third-party action against Bronx Towing, holding that *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282 (1952) foreclosed the indemnity action. In *Halcyon* the Supreme Court, con-

---

(*Footnote continued from preceding page*)

opinion of this court. The Sixth Circuit in *Chesapeake & Ohio Railway Company* v. *Newman*, 243 F. 2d 804, 808 (6 Cir. 1957), interpreted *Walker* as precluding recovery only when the breach of the contractual duty the employee owed the employer was "the sole and proximate cause" of the employee's injury. But this Sixth Circuit effort to avoid express repudiation of *Walker* is as fruitless as that of the Fourth Circuit. If the employee's negligence was the sole and proximate cause of the injury, it is of no moment that this negligence constituted a breach of some contractual duty. The *Walker* case has been hostilely criticized in the law reviews. See 62 Yale L. J. 111; Harv. L. Rev. 1238.

fronted with a shipowner's claim against a stevedoring company whose employee had obtained a judgment against the shipowner, held that maritime law does not permit contribution among joint tortfeasors in non-collision cases. Since appellant's action against Bronx Towing would first require a jury finding in the wrongful death action that appellant had in some manner breached its duty toward Dunbar, the district court reasoned that *Halcyon* denied appellant any indemnity unless there was an implied exception to the *Halcyon* doctrine in favor of a shipowner whose negligence was merely passive; and, moreover, even if there were such an exception, the exception would not benefit appellant because the complaint in the wrongful death action alleged that appellant was actively negligent.

We hold that the district court erred in dismissing the third-party action. In *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124 (1956) it was held that, notwithstanding *Halcyon*, there was an implied warranty of safe stowage in the stevedoring company's contract with the shipowner, and if the breach of this implied warranty caused the shipowner to become liable to the stevedoring company's employee, the shipowner could maintain an action against the stevedoring company for indemnity based upon that implied warranty. In *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958) the Court expanded the stevedoring company's implied warranty to include the obligation to use proper equipment. Most recently, in *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 429 (1959), the Court held that the stevedoring company's "warranty of workmanlike services" imposed liability when the stevedore's negligence brought into play an unseaworthy condition already existing on the vessel. In *James McWilliams Blue Line* v. *Esso Standard Oil Co.*, 245 F. 2d 84 (2 Cir. 1957) we held that the obligation to indemnify for negligent towage was the same as the obligation to indemnify

for negligent stowage under the *Ryan* doctrine. Juxtaposing *Crumady* and *McWilliams Blue Line*, it becomes clear that appellant has set forth a cause of action against Bronx Towing by alleging that the unseaworthy condition of the *Trenton* which led to Dunbar's death was brought into play by the negligent manner in which the tug *Cortland* performed its towing operation.

Reversed and remanded for new trial on the third-party complaint. It is ordered that the third-party action be severed from the wrongful death action so that plaintiff's judgment in the latter shall be presently payable.

Appendix

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of February one thousand nine hunder and sixty.

Present: HON. CHARLES E. CLARK,

HON. CARROLL C. HINCKS,

HON. STERRY R. WATERMAN, Circuit Judges.

HAZEL DUNBAR, as Admx. under Limited Letters of Robert Dunbar, deceased,

Plaintiff-Appellee,

v.

HENRY DUBOIS' SONS CO., INC.,

Defendant & 3rd Party Plaintiff-Appellant,

BRONX TOWING LINE, INC.,

3rd-Party Defendant and Supplemental Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is for judgment n.o.v. be and it hereby is affirmed with costs to plaintiff-appellee.

Further ordered adjudged and decreed that the judgment dismissing the third-party action be and it hereby is reversed and remanded in accordance with the opinion of this Court with one-third costs to third-party plaintiff-appellant.

Further ordered that the third-party action be and it hereby is severed from the wrongful death action in accordance with the opinion of this Court.

A. DANIEL FUSARO,
Clerk

Appendix

Memorandum Denying Petitioner's Petition for Rehearing *en Banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HAZEL DUNBAR, as Administratrix under Limited Letters of the Estate of ROBERT DUNBAR, Deceased,

Plaintiff-Appellee,

—v.—

HENRY DUBOIS' SONS CO., INC.,

Defendant and
Third-Party Plaintiff-Appellant,

—v.—

BRONX TOWING LINE, INC.,

Third-Party Defendant-Appellee.

Petition for rehearing denied.

s/ CEC
s/ JEL
s/ SRW
s/ LPM
s/ HJF

March 9, 1960.

Appendix

Title 46, U. S. Code, Section 688:

"Sec. 688. Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007."

Title 45, U. S. Code, Section 53:

"Sec. 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*,

That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier or any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66."

Title 45, U. S. Code, Section 54:

"Sec. 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 109

HENRY DUBOIS' SONS CO., INC.,
Petitioner,

AGAINST

HAZEL DUNBAR, as Administratrix under limited letters of the Estate of ROBERT DUNBAR, deceased,
Respondent.

Brief of Respondent Hazel Dunbar in Opposition to the Petition of Henry DuBois' Sons Co., Inc. for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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62 Yale Law Journal, 111, 114 5

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

HENRY DUBOIS' SONS CO., INC.,
Petitioner.

AGAINST

HAZEL DUNBAR, as Administratrix under limited letters of the Estate of ROBERT DUNBAR, deceased,
Respondent.

Brief of Respondent Hazel Dunbar in Opposition to the Petition of Henry DuBois' Sons Co., Inc. for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Statement of Facts
and
State of the Case

Plaintiff sued in United States District Court, Southern District of New York, under the Jones Act, 46 U. S. C. A. Section 688, to recover for the death of her husband Robert Dunbar, who was drowned when the wooden derrick barge *Trenton*, on which he was employed, capsized

while in tow and sank in the waters of Hempstead Harbor, New York. At the time of the casualty, about 1:30 A.M. on June 7th, 1955, Dunbar was the only person on the vessel, having been ordered by defendant-shipowner (petitioner), his employer, to go with the *Trenton* from her moorings at Roosevelt Street, East River, New York, at 9:00 P.M. on June 6th to Hempstead Harbor, where a new dredging job would be started the following morning.

The evidence at trial showed that Dunbar had put in a full days' work on June 6th and that, although he was ordered to ride the *Trenton* that night and go to work again the next day on the new job, no relief man was provided for the overnight trip.

It was established also by the plaintiff, through one of defendant's former employees who had worked on the *Trenton* for many years, that the vessel was in an advanced state of deterioration, particularly with respect to the caulking in her seams, in consequence of which she would take abnormal quantities of sea water while in tow. The Circuit Court states that plaintiff's "contention was supported by substantial evidence adduced at trial". 275 F. 2d 304, 305.

The Verdict

After discussion of the subject with counsel, the trial judge submitted to the jury eight special interrogatories covering two phases of the case: liability and damages. These interrogatories are reproduced in respondent's appendix, pages 13-14.

It will be seen that the jury found defendant Henry DuBois' Sons Company liable on the grounds: (1) that its vessel *Trenton* was unseaworthy at the time of the sinking, in consequence of the negligence of defendant

DuBois, and (2) that these things contributed to the sinking and the loss of life of Robert Dunbar.

The jury found also that decedent Robert Dunbar had been negligent "in the performance of his duties aboard the *Trenton*", to the extent of 20%.

Judgment for the widow Hazel Dunbar and her infant child was entered in the sum of $62,000 as found by the jury. On appeal to the Second Circuit Court of Appeals, this judgment was affirmed, 275 F. 2d 304, February 1960; at the end of which decision (p. 307), the Court ordered that the wrongful death action be severed from a third-party action against the towing company, "so that plaintiff's judgment in the latter shall be presently payable". Petition for rehearing *en banc* was denied.

The Petition Must Be Denied Because (1) the Petitioner Misconstrues the Verdict; (2) This Court in the *Tiller* Case, 318 U. S. 54, Rejects Petitioner's Argument That the Jury's Finding of Contributory Negligence Means That Decedent Breached His Contract of Employment.

Petitioner rests its application to this Court, as it did in the Court of Appeals, on the argument that plaintiff is barred from recovery in this Jones Act suit because of the jury's finding of contributory negligence against plaintiff's decedent, on the theory that this constituted a breach by decedent of his contract of employment. Petitioner relies on the doctrine expounded in cases such as *Walker v. Lakes Bros. S.S. Co.*, 2 C. A., 1952, 193 F. 2d 772, and *Dixon v. United States*, 2 C. A., 1955, 219 F. 2d 10, to the effect that for the *non-performance* of an independent duty which causes damage to the employer, the employee may not recover for injury to himself. Petitioner reaches

this conclusion by a species of sophistry that transforms the essential nature of the jury's verdict.

We submit that, in order to obtain a writ of certiorari in *this* case, petitioner is bound to satisfy the Court that an ordinary jury finding of contributory negligence is equivalent to a finding *as matter of law* that the plaintiff has breached his employment contract.

Petitioner's argument rests, indeed *must* rest, on the findings of the jury as contained in answers to special interrogatories (see Resp. App., pp. 13-14); therefore, it is respectfully submitted that if this Court find, as we contend it should, that petitioner's interpretation of those findings is untenable, then there is no valid problem—certainly no "law" problem—stated or presented in the petition.

The Meaning of the Verdict

We are dealing here with a common, every-day plaintiff's verdict in a Jones Act case, which verdict contained a finding of contributory negligence that diminished the recovery; but the petitioner's arguments take the verdict out of context and distort its meaning, so that the "Questions" posed to this Court in the petition (pp. 2-3) are specious.

The jury found that at the time she capsized the derrick barge *Trenton* was unseaworthy and that such unseaworthiness, coupled with the negligence of defendant shipowner DuBois Company which produced the condition, caused the sinking and loss of Dunbar's life (Resp. App., pp. 13-14).

In its Question 1 (Pet., p. 2) petitioner states that the jury "has found *specifically and expressly* that decedent's *breach of duty* was one of the causes of the sinking of his vessel and of his loss of life" (italics ours). When this ex-

travagant statement is compared with the literal text of Question No. 5 and the jury's answer.

> "Question No. 5—Was the deceased negligent in the performance of his duties aboard the *Trenton*? Answer—Yes."

it is manifest that the jury certainly did *not* find "specifically and expressly" that Dunbar was guilty of "breach of duty". On the contrary, they found that Dunbar *performed* the work but, in some way not stated, was careless.

Assuming *arguendo* that jury finding No. 5 means, as petitioner urges, that Dunbar "breached his duty" to his employer. This would still leave the finding of unseaworthiness of the vessel, which condition the jury found was brought about by the negligence of defendant ship owner, *not* by Dunbar the employee. The unseaworthiness was the underlying cause of the casualty; Dunbar's fault, at most, was secondary. If petitioner were right, what then becomes of the finding of fault against the ship owner defendant?

We say that the disposition suggested by petitioner would be intolerable, that it would make a mockery of the Jones Act and of the Federal Employer's Liability Act, the source statute.

> "Congress has twice acted to make controlling the rule of comparative negligence. Lodged with the courts is the duty to effectuate, not frustrate, this legislative command." 62 Yale Law Journal 111, 114.

Petitioner's Charge of Breach of Duty Is Dilatory

Ample opportunity at trial was open to petitioner, if it chose, to have requested a charge from the court to the effect that if the jury found that Dunbar's negligence constituted a breach of his employment contract, it could bring in a verdict in favor of petitioner. No such request was made.

> "It is indeed a part of the jury's duty to fix the standard of care which the circumstances should evoke in any given case; and there are no general rules to govern them in their choice. Nevertheless, that does not mean that a defendant may never demand that the judge shall separate different groups of facts and suggest that they may call for different standards."
>
> Judge Learned Hand, in *Walker* v. *Lykes Bros. S.S. Co.*, 2 C. A. 1952, 193 F. 2d 772, 775.

Finally, where the defendant shipowner's negligence is found to be the underlying or proximate cause of the casualty, whatever degree of fault be found against the employee is no more than a contributing factor. Since that is the situation in the case at bar, it is impossible to invalidate the verdict on the ground that finding No. 5 constitutes a bar to plaintiff's recovery, because the negligence of the petitioner shipowner and the contributory fault of Dunbar are inseparably intermingled. *Chesapeake & Ohio Railway Co.* v. *Newman*, 243 F. 2d 804, 808 (6 C. A., 1957).

In its tortuous efforts to produce a meaning from jury finding No. 5 which cannot be spelled out of its plain language, petitioner betrays the difficulty which is the

root of its predicament: *that there is no jury finding* to support its point because no request was made by petitioner to the trial court for a special interrogatory framed to elicit a yes-or-no response as to whether or not, on the evidence adduced, there had been a breach of his employment contract by Dunbar.

This Court in the *Tiller* Case Has Held That the 1939 Amendment to F. E. L. A. "Swept Into Discard" All Rules Except That of Comparative Negligence. One of These Was the "Primary Duty Rule," Which Petitioner Now Seeks to Invoke (Pet., p. 2).

In 1943 this Court in *Tiller* v. *Atlantic Coast L. R. Co.*, 318 U. S. 54, 65, emphasized that the 1939 amendment to the Federal Employer's Liability Act

> "• • • Was clearly aimed at making the principles of comparative negligence the guiding rules of decision in accident cases. 'The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.'" (The latter quotation from Senate Hearings.)

Lest there be any doubt that the rule of comparative negligence was intended by Congress to supplant all other "doctrines", this Court declared (ibid., p. 66):

> "The doctrine of assumption of risk can not be 'abolished in toto' and still remain in partial existence as the court below suggests. The theory

that a servant is completely barred from recovery for injury *resulting from his master's negligence*, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, *contrary to the will of Congress*, be allowed recrudescence under any other label in the common law lexicon. The Act of 1908 and the amendment of 1939 abolish the post-Priestly v. Fowler defenses and authorize comparison of negligence instead of barring the employee from all recovery because of contributory negligence. *They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.*" (Italics ours.)

Again (ibid., p. 67):

> "* * * A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: 'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.'"

In a concurring opinion in the *Tiller* case, Mr. Justice Frankfurter declares (ibid., p. 72):

> "* * * The basis of an action under the Act remains the carrier's negligence."

Concerning the "primary duty" rule, this Court said (ibid., pp. 63-64):

> "* * * Aside from the difficulty of distinguishing between contributory negligence and assump-

> tion of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk" (citing cases).
>
> • • • • •
>
> "It was this maze of law which *Congress swept into discard* with the adoption of the 1939 amendment to the Employers' Liability Act." (Italics ours.)

In 1954 the 5th Circuit Court of Appeals, in *Louisiana & Arkansas Ry. Co.* v. *Johnson*, 214 F. 2d 290, dealt with a suit brought by a railroad brakeman who was injured in a collision between his train and another. At the trial the railroad's attorney had contended that plaintiff was bound under an operating rule of the railroad, that he was injured in consequence of non-compliance with the rule and, therefore he was not entitled to recover (which is virtually the contention of petitioner in the instant case).

In the *Johnson* case (p. 291), the requested jury instruction read:

> "Where a trainman has a personal duty to perform under the operating rules of the defendant railroad and fails in that duty, as a result of which he is injured, he is not entitled to recover under the Federal Employer's Liability Act, notwithstanding the fact that it was also the duty of other members of the crew to watch for an approaching train with which his train collided, and that their negligence may have contributed in a proximate way to the injury of the plaintiff."

The trial court declined so to charge, and it was upheld by the appellate court, which said (ibid., p. 292):

> " * * * Following the enactment of the 1939 amendment, the Supreme Court held that 'every vestige of the doctrine of assumption of risk was obliterated from the law' and that the 'primary duty rule' in Unadilla Valley Ry. Co. v. Caldine, supra, and Davis v. Kennedy, supra, had been 'swept into discard'. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 58, 63, 64, 63 S. Ct. 444, 446, 87 L. Ed. 610. Since that decision, in cases arising under the Federal Employer's Liability Act, even the engineer has been held not barred by the 'primary duty rule', Atlantic Coast Line R. Co. v. Mangum, 250 Ala. 431, 34 So. 2d 848, 852; Atlantic Coast Line R. R. v. Anderson, 200 Ga. 801, 38 S. E. 2d 610, see also Keith v. Wheeling & L. E. Ry. Co., 6 Cir., 160 F. 2d 654, 657. * * * "

The instant case was decided by a jury which answered specific interrogatories. The answers clearly find that the defendant was guilty of negligence in failing to furnish a seaworthy vessel. They also find that decedent was 20% responsible for the occurrence. This is a simple Jones Act situation, and the rule of comparative negligence would be rendered ineffectual if every seaman found guilty of contributory negligence was declared to have breached a contractual duty. The petitioner urges a turning back to the hard common law rule of no recovery because of contributory negligence in any degree.

The Court of Appeals unanimously held that the *Walker* doctrine did not bar recovery in this case and a petition for rehearing was denied by five Court of Appeals Judges.

In discussion under the heading, "Reasons for Granting of Writ" (Pet., pp. 8-9), petitioner cites a number of decisions rendered by this Court in FELA cases in support of its contentions that recovery in this case is barred by reason of plaintiff's decedent's breach of his employment contract.

It is to be noted that *all* of the cases cited came before this Court and were decided before 1939, the year in which Congress amended the Federal Employer's Liability Act; indeed, the most recent before 1939 was the case of *Southern Ry. Co.* v. *Youngblood*, 286 U. S. 313, decided in 1932.

Question No. 2 (Pet., p. 2)

Comment Concerning 18 U. S. C. A., Section 2196 (Pet., p. 10)

This is "new matter," never before raised by petitioner. We shall not labor the point that this statute is clearly inadmissible for these reasons:

(1) Dunbar was not employed on a merchant vessel, as that term has been judicially defined. *Adams* v. *United States*, D. C. Mass., 1922, 281 Fed. 895, 896.

(2) Since the statute is penal in nature, in no event could it be material or relevant unless and until it were shown that decedent Dunbar had been *convicted* of violating it. This was not possible, because Dunbar died of drowning when the *Trenton* capsized.

The Motion by Petitioner for Judgment N. O. V. Was Properly Denied

It is contended (Pet., pp. 13-14), that after the verdict was returned, the petitioner's motion for judgment n. o. v.

should have been granted because only a naked question of law was then before the Court; citing a decision of this Court, *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243. This citation does not sustain petitioner's position; on the contrary, it supports that of respondent, for the reason that judgment n. o. v. *cannot* be granted where the verdict is based on substantial evidence, as the Court of Appeals holds it was in this case, 275 F. 2d 304, 305.

Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 251 (1940);

Danko v. Leary, 149 F. 2d 66, 68, C. C. A. 3 (1945);

Barron & Holtzoff, Vol. 2, Sec. 1079, p. 774.

Comment Concerning Indemnity

Under subhead 3 (Pet., pp. 12-13) petitioner discusses the subject of indemnity. Since, as we have shown in this brief, petitioner's whole argument is grounded on a forced interpretation of jury finding number 5 (Resp. Br., pp. 4-5), the matter of indemnity becomes academic.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

The Jury's Verdict and Findings

The Jury will render a Special Verdict answering the following questions by their unanimous vote—

Question No. 1:

Was the derrick barge *Trenton* in an unseaworthy condition because of the negligence of the DuBois Company?

Answer: Yes.

Only if your answer was in the affirmative, answer.

Question No. 2:

Did this unseaworthy condition in whole or in part contribute to occasioning the sinking of the *Trenton* and the drowning of deceased Robert Dunbar?

Answer: Yes.

Question No. 3:

Were the agents or employees (other than the deceased) of Henry DuBois Sons Co., the owner of the *Trenton*, negligent in the maintenance and operation of the derrick barge *Trenton?*

Answer: Yes.

Questions No. 4:

Did such negligence of Henry DuBois Sons, Co., in whole or in part contribute to occasioning the sinking of the *Trenton* and the drowning of the deceased?

Answer: Yes.

Question No. 5:

Was the deceased negligent in the performance of his duties aboard the *Trenton?*

Answer: Yes.

The Jury's Verdict and Findings

Question No. 6:

Did such negligence of Robert Dunbar contribute in whole or in part to occasioning the sinking of the *Trenton* and his drowning?

Answer: Yes.

Only if your answer to question number 6 was in the affirmative answer—

Question No. 7:

State in what percentage you find that such negligence of Robert Dunbar did contribute to occasioning his drowning.

Answer: 20%.

Question No. 8:

A. What was the total pecuniary loss sustained and suffered by the widow of Robert Dunbar, as a result of his drowning?

Answer: A. $42,000 (Forty-two thousand).

B. What was the pecuniary loss sustained and suffered by the daughter of Robert Dunbar, as a result of his drowning?

Answer: B. $20,000 (Twenty thousand).

The above quoted amounts of $42,000 and $20,000 represents the final net amount *after deducting* the 20% due to the negligence of the deceased.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 109

HENRY DU BOIS' SONS CO., INC.,

Petitioner,

against

HAZEL DUNBAR, as Administratrix under limited letters of the Estate of ROBERT DUNBAR, deceased,

Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

EDMUND F. LAMB,
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80 Broad Street,
New York 4, N. Y.

VINCENT A. CATOGGIO,
of Counsel.

In The

Supreme Court of the United States

OCTOBER TERM, 1959

No. 965

HENRY DU BOIS' SONS CO., INC.,

Petitioner,

against

HAZEL DUNBAR, as Administratrix under limited letters of the Estate of ROBERT DUNBAR, deceased,

Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

The respondent's brief argues that the jury finding in answer to Question No. 5 does not justify petitioner's statement that the jury found decedent guilty of "breach of duty", and that petitioner's conclusion that it does "is a species of sophistry that transforms the essential nature of the jury's verdict".

Should the language of Question No. 5 leave any doubt as to what the jury found, that doubt is removed when we read the trial court's charge (Appellant's Appendix in Court of Appeals, pp. 80 to 99). Although calling the case contributory negligence, the court repeatedly told the jury the question as to his fault was simply whether decedent watched the bilges and manned the pumps.

The Court charged:

"The deceased had no authority to control the movement of the *Trenton* or to employ others to work under him aboard. It was his duty to perform generally the duties of a deckhand, and make fast and unfasten mooring and tow lines; to help clean up the barge, to watch the bilge and help man the pumps when necessary." (84)

* * *

"It is the contention of the DuBois Company— * * * that the deceased failed to perform his work and keep watch on the bilge and man the pumps * * *" (85)

* * *

"The duty to perform and to determine what should have been done for the safe maintenance of the *Trenton* with reference to the manning of the pumps and the operating of the pumps when necessary rested and remained with those aboard the *Trenton* and not on the master or crew of the tug." (92)

When the Court told the jury that petitioner's contention rested solely on the failure of deceased "to perform his work and keep watch on the bilges and man the pumps", their answer to Question No. 5 was a clear statement that decedent did not watch the bilges and man the pumps.

New York, N. Y., July 6, 1960.

Respectfully submitted,

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